

Page 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

IN RE: )  
PHARMACEUTICAL INDUSTRY AVERAGE ) CA No. 01-12257-PBS  
WHOLESALE PRICE LITIGATION ) CA No. 06-11337-PBS  
 ) Pages 1 - 85  
 )

DAUBERT HEARING - DAY TWO

BEFORE THE HONORABLE PATTI B. SARIS  
UNITED STATES DISTRICT JUDGE

United States District Court  
1 Courthouse Way, Courtroom 19  
Boston, Massachusetts  
December 11, 2009, 2:05 p.m.

LEE A. MARZILLI  
OFFICIAL COURT REPORTER  
United States District Court  
1 Courthouse Way, Room 7200  
Boston, MA 02210  
(617)345-6787

1 A P P E A R A N C E S:

2  
3 GEORGE B. HENDERSON, ESQ. and JAMES J. FAUCI, ESQ.,  
Assistant United States Attorneys, Office of the United States  
4 Attorney, United States District Court, Suite 9200,  
1 Courthouse Way, Boston, Massachusetts, 02210.

5 MARK A. LAVINE, ESQ. and ANN ST. PETER-GRIFFITH, ESQ.,  
6 Assistant United States Attorneys, Office of the United States  
Attorney, 99 NE 4th Street, Suite 300, Miami, Florida, 33132.

7 RENEE BROOKER, ESQ., United States Department of Justice,  
P.O. Box 14271, Washington, D.C., 20044.

8  
9 JAMES J. BREEN, ESQ., The Breen Law Firm,  
3562 Old Milton Parkway, Alpharetta, Georgia, 30005.

10 FOR THE DEFENDANTS:

11 DAVID S. TORBORG, ESQ., Jones Day,  
12 51 Louisiana Avenue, N.W., Washington, D.C., 20081-2113.

13 JAMES R. DALY, ESQ. and JASON G. WINCHESTER, ESQ.,  
Jones Day, 77 West Wacker, Chicago, Illinois, 60601-1692,  
14 for Abbott Laboratories.

15

16

17

18

19

20

21

22

23

24

25

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
MARK G. DUGGAN				
By Mr. Daly:		6		
By Mr. Lavine:			81	
EXHIBITS		PAGE		
2-For ID		42		
3-For ID		44		

1 P R O C E E D I N G S

2 MARK G. DUGGAN

3 having been previously duly sworn, was examined and testified  
4 further as follows:

5 (Discussion off the record.)

6 THE COURT: You're still under oath.

7 THE WITNESS: Do I just sit?

8 THE COURT: Yes, you just sit, even though it's called  
9 the "stand."

10 THE WITNESS: Right.

11 MR. LAVINE: Your Honor, one thing we didn't get to  
12 present yesterday, we didn't have any additional questions  
13 about it, but it's just a set of the peer-reviewed literature  
14 that Dr. Duggan cited. Can we have that marked and add that to  
15 the materials?

16 THE COURT: Yes.

17 MR. LAVINE: And counsel has a copy.

18 THE COURT: And can I say, from my vantage point, I  
19 loved this binder. You know, when you file crates full, you  
20 can't expect me to read it. So that when you give me the key  
21 things you need me to focus on, it's just very helpful going  
22 forward. This will be my starting point, and there may be  
23 additional ones from Abbott, but I won't be going through the  
24 giant crate. Okay?

25 MR. DALY: Very well, your Honor.

1                   MR. LAVINE: And can I just mention one more thing in  
2 terms of scheduling, that Dr. Duggan is on a very tight  
3 schedule, he has a very full plate. I want to make sure he's  
4 done today.

5                   THE COURT: He will be done today, but there may be no  
6 opportunity for redirect. I'm going to give them what you got  
7 yesterday.

8                   MR. LAVINE: Okay. That was my next request, but I  
9 hear you. Thank you.

10                  MR. DALY: Thank you, your Honor. Your Honor, we've  
11 prepared an exhibit book as well.

12                  THE CLERK: You're going to offer these as exhibits?

13                  MR. DALY: For identification right now.

14                  THE COURT: Do you have one for the record too?

15                  MR. DALY: Yes.

16                  THE COURT: Yes, so that any appellate court would  
17 know, you know.

18                  THE CLERK: I need an official one for the record.

19                  MR. DALY: Yes, we will do that afterwards.

20                  THE COURT: Because this is what I'm going to use in  
21 resolving it. I'm not going back through the giant crate of  
22 documents.

23                  MR. DALY: Your Honor, I think that's fair. We might  
24 have a couple more that we add based on yesterday's testimony,  
25 but I think you're right, you'll have everything in these

1 couple of notebooks that you're going to need.

2 THE COURT: Okay, good.

3 MR. LAVINE: Although one question on that, Judge.

4 Both of the opposing experts have been sent home is my  
5 understanding, so neither one of them are available today. And  
6 one of the issues that came up yesterday is, there was a  
7 discussion that they had actually done some additional analysis  
8 for the states, and that's never been produced to us. We've  
9 never seen that.

10 THE COURT: Let me deal with that later. Let's just  
11 get through him so he can go back and do all the stuff he's  
12 doing down there, all right? So let's just make sure we get  
13 through him, and I'll worry about everybody else later, okay?

14 It's ten past 2:00.

15 MR. DALY: I'm ready, your Honor. Your Honor, my  
16 exhibits are all marked, so with the Court's permission,  
17 Mr. Torborg is going to man the Elmo machine.

18 THE COURT: Great.

19 MR. TORBORG: At least I'll try.

20 THE COURT: It's true of all of us, right?

21 CROSS-EXAMINATION BY MR. DALY:

22 Q. Good afternoon, Dr. Duggan.

23 A. Good afternoon.

24 Q. Can I direct you to Tab 2 in the book that I've handed  
25 you, which is your supplemental report, and Page 2 of that,

1 sir. There is a table that sets forth your damages for  
2 Medicare, correct?

3 A. Did you say this was the rebuttal report or --

4 Q. No, I believe I said it was your supplemental report.

5 A. Yes, I see that.

6 Q. And I'm just picking up where you left --

7 THE COURT: Wait, where are we? Tab 2.

8 MR. DALY: Tab 2, Page 2, Judge.

9 THE COURT: It refers to Medicaid, so why are you  
10 saying Medicare? Am I in the wrong place? It says "Summary of  
11 revisions to Medicaid analysis for the removal of Ohio." I  
12 just want to make sure I'm looking at the right thing here.

13 Q. Is Tab 2 not your supplemental report, sir?

14 A. No, it is.

15 Q. And the table reflects the damages for Medicare as well as  
16 Medicaid?

17 THE COURT: You know, I don't have that, at least not  
18 in Tab 2.

19 THE WITNESS: I think if you go down to the subsequent  
20 lines of that table, I think the first line is Medicaid, so  
21 this is on the second page of Tab 2.

22 THE COURT: All right, I have that, what you have up  
23 on the screen, but not that prior --

24 THE WITNESS: Right, and that has some Medicare  
25 numbers on it, right.

1 THE COURT: Yes.

2 Q. And I just wanted to confirm that your Medicare Part B-1,  
3 the \$15.6 million, that is the damages that you computed for  
4 carriers for which you had arrays, correct?

5 A. That is my best recollection. Would you mind if I just  
6 checked my report just to confirm that?

7 Q. Sure.

8 A. That's my best recollection, that is correct, yes.

9 Q. And that number includes some extrapolation for carriers  
10 for which you had arrays, correct?

11 A. That's correct.

12 Q. And the next line down, the Medicare Part B-2, the  
13 \$15.7 million, do you see that figure?

14 A. I see that.

15 Q. And that is the extrapolation that you did for the  
16 carriers for which you had no arrays, correct?

17 A. Correct.

18 Q. And that is a hundred percent extrapolation, correct?

19 A. Correct.

20 Q. And yesterday you mentioned that you computed Medicare  
21 damages for five of the J-Codes; is that right?

22 A. Correct.

23 Q. And that the other six, you basically made the difference  
24 zero manually, correct?

25 A. Correct.

1 Q. And so you're not coming forward with any damages for  
2 those six J-Codes, right?

3 A. In my report, that's correct.

4 Q. Now, in terms of the numbers of carriers that are out  
5 there, there's approximately 92 carriers during the relevant  
6 time period here?

7 A. Is that a question?

8 Q. Yes.

9 A. I'm not sure if it's 92 or 80 or -- it's in the 70, 80, 90  
10 range. And as mentioned yesterday, it depends a little bit on  
11 how you count the carriers. If you group together, for  
12 example, Connecticut General, there's a number of carrier  
13 numbers that are under the Connecticut General umbrella. So if  
14 one looks at Table 35, I think, from my report, it looks from a  
15 quick scan to me like fewer than 92, but maybe.

16 Q. Is it your recollection that there's approximately 90, 92  
17 different carrier codes?

18 A. Seventy is the number that --

19 Q. Why don't you take a look at your affidavit that you filed  
20 in this matter, which is Tab 6 in the book that I gave you.

21 A. Okay.

22 Q. And please look at Paragraph 21 of that affidavit, sir.  
23 Do you see the last line of that paragraph?

24 A. Yes. Okay, so I just have -- there are a lot of numbers,  
25 but, yes, 92 sounds plausible.

1 Q. And as you were mentioning, there are some carriers that  
2 may have used multiple carrier codes?

3 A. Correct.

4 Q. Is it your recollection that there's approximately 40 or  
5 50 unique carriers?

6 A. I don't have that number at my fingerprints, but it sounds  
7 plausible, 40, approximately. That would reflect an average of  
8 about two codes per carrier. Some carriers have more codes;  
9 some have just one. It sounds plausible.

10 Q. And in terms of unique carriers, I mean, carriers for  
11 which you had arrays, you only had arrays for four carriers,  
12 right?

13 A. Once again, I think that it's a -- there are a number of  
14 carriers that for much of the period -- so I don't think four  
15 is correct. I don't think four is accurate, just to back-  
16 pedal. So there are a number of carriers, as I indicate in  
17 Table 43, there are about seven different carriers for which I  
18 had array information. These other Region 5, for example,  
19 piggybacked on Wisconsin Physician Services, so I just want  
20 to -- I want to clarify the point.

21 Q. And I want to help make that clear as well. So WPS is one  
22 of the carriers for which you had arrays right, and that's  
23 Wisconsin Pension or something --

24 THE COURT: You know, I can't even hear you, Mr. Daly.  
25 So WPS, what was the point you were making?

1 Q. WPS is one of the carriers that you had arrays for in the  
2 case, right?

3 A. That's correct.

4 Q. And several of the other carriers used those same arrays,  
5 correct?

6 A. Correct.

7 Q. And several of the carriers that you have arrays for are  
8 actually using WPS arrays, correct?

9 A. That's correct.

10 Q. All right. And your individual carriers, your unique  
11 carriers were Connecticut General, WPS, other Region 5, right?  
12 Other Region 5 used the WPS arrays, correct?

13 A. Yes, that's correct.

14 Q. And you also had Kentucky Administar, correct?

15 A. Correct. And just one thing to clarify on that last one.  
16 I try to be clear in the report that there are certain periods  
17 during which the other Region 5 carriers used, just trying to  
18 be precise, used Wisconsin Physician, not necessarily  
19 throughout the period. I don't have it memorized right now  
20 what exact period that was, but for much of the period, that's  
21 right, they utilized Wisconsin Physician's arrays.

22 Q. And West Virginia Nationwide, another one of the carriers  
23 that you calculated differences for, they also used the WPS  
24 arrays, right?

25 A. For part of the period.

1 Q. And another company that you had arrays for was other  
2 Metra Health, right?

3 A. Uh-huh.

4 Q. And, finally, Florida Blue Cross-Blue Shield, right?

5 A. Correct. I -- yes.

6 Q. And for the rest of the carriers that are out there, you  
7 had no arrays for them, right?

8 A. The carriers that are not listed in Table 43, I did not  
9 have arrays for, that's correct.

10 Q. And it's your understanding that those arrays are gone,  
11 they're no longer available, right?

12 A. To the best of my knowledge, I have the arrays that were  
13 available.

14 Q. And you don't have any information that any other arrays  
15 exist other than the ones that were given to you, right?

16 A. It is my understanding that the carriers -- can you  
17 repeat? I'm --

18 Q. I was just trying to find out, do you have any information  
19 that suggests that there are any more arrays available from any  
20 source other than the ones that have been given to you to  
21 perform your analysis here?

22 A. No, I do not.

23 Q. Why don't you take a look, if you would, sir, at Tab 26 in  
24 the book that I gave you.

25 A. Tab 26 is empty.

Page 13

1 Q. Oh, sorry. It should be a very interesting chart then.

2 A. Okay, great.

3 (Discussion off the record.)

4 Q. Now, Doctor, with respect to Tab 25 --

5 A. Tab 26.

6 Q. Tab 26, I'm sorry. Tab 26 is a graphic image of the  
7 various arrays in this case that you did and did not have, and  
8 let me just kind of walk you through it.

9 MR. LAVINE: Your Honor, can I just note an objection.

10 We've never seen this chart before. It's the first time it's  
11 ever been disclosed to us.

12 THE COURT: Well, it's actually very useful to me to  
13 understand it. I'll do the same that I did for him. If you  
14 think it's wrong after you review it afterwards, let me know,  
15 but it's actually helpful because it's what we were talking  
16 about yesterday, which is how much did he extrapolate it from.  
17 It's just a graphic depiction of it. It may be wrong, and you  
18 can tell me about it later.

19 Are there any more of these because no one should be  
20 popping anything? Why wasn't this given to him before?

21 MR. DALY: Your Honor, to be honest, we were working  
22 on it as late as this morning.

23 MR. LAVINE: Yesterday we heard an objection because  
24 we only gave them two weeks lead time.

25 THE COURT: And I overruled it.

1                   MR. LAVINE: I know, but now here we are the minute  
2 before it's being put to use.

3                   THE COURT: You know what, let's not waste time on it.  
4 I'll let you refute it if it turns out not to be true, okay?  
5 So we're at a Daubert hearing. If it were a trial, it would be  
6 out the window.

7 Q. Let's take a look at this chart, and also you might want  
8 to turn to Table 25 of your initial report.

9 A. Okay, not of this. My report.

10 Q. Right.

11                  THE COURT: What tab are we now?

12                  MR. DALY: Table 25 of the initial report, which is  
13 Exhibit 1 in the book that I've handed out, Judge.

14                  THE COURT: Hold on, which tab, 25?

15                  THE WITNESS: No. Table 25 in Tab 1.

16                  MR. DALY: Tab 1, your Honor.

17                  THE COURT: Tab 1, yes.

18                  MR. DALY: And Table 43.

19                  THE COURT: Table 43, okay.

20                  MR. DALY: Which is the very last page, the second of  
21 two last pages.

22                  THE COURT: All right, got it.

23 Q. And, Doctor, just if you look at your Table 25, you list  
24 down in the left-hand column the various carriers that you had  
25 arrays for; is that correct?

1 MR. HENDERSON: Table 43?

2 MR. DALY: I believe that's correct, yes.

3 MR. HENDERSON: You said Table 25, I think.

4 MR. DALY: I'm sorry.

5 Q. Do you see that, sir?

6 A. I see that.

7 Q. And does that correspond to the carriers that we've listed  
8 above the line in Chart 26?

9 A. It does, yes.

10 Q. And then as you continue with Table 43, which is the next  
11 page after -- Table 44 right after 43, these are some of the  
12 other carriers that you do not have arrays for, right?

13 A. It looks correct.

14 Q. And those companies that you do not have arrays for, those  
15 are the ones that appear in the gray boxes below the line on  
16 Chart 26, right?

17 A. Correct.

18 Q. Now, for some of the years, you had situations where you  
19 didn't have an actual array for a given quarter for a given  
20 carrier, but you had evidence that the carrier may have been  
21 using arrays from adjacent quarters; is that correct?

22 A. I had the -- rephrase that.

23 Q. Within the carriers that you had some arrays for, you did  
24 not have individual quarter-by-quarter arrays for all time  
25 periods, right?

1 A. That is correct.

2 Q. And for some of the periods, you used adjacent arrays from  
3 other quarters on the ground that the company probably used  
4 those for the quarters that they did not have arrays for,  
5 correct?

6 A. I think there's a bit more to it than that.

7 Q. Okay, do you want to explain that?

8 A. In terms of the analysis of the data, being able to see  
9 the allowed amounts in the data and whether the allowed amounts  
10 moved substantially between those periods. So that's something  
11 that -- it wasn't -- that was conducted as with, you know,  
12 other analyses that I talked about yesterday, with an eye to  
13 the data itself, so looking at the underlying paid claims data.

14 Q. And in terms of just comparing Tab 26, the chart, to your  
15 Table 43, if you look at the first column after the name of the  
16 carrier on the left, you have these periods, and you have --  
17 for example, Connecticut General is the first -- and this is on  
18 Table 43 -- and you show Q-1 1997 through 2001 Q-4, right?

19 A. Can you point me again?

20 Q. Table 43, the second column.

21 A. Okay.

22 Q. Under the heading "Period," do you see that?

23 A. Sure.

24 Q. And so for Connecticut General, this first line of '97 Q-1  
25 to 2001 Q-4, that is the period for which you had arrays,

1 right?

2 A. That's correct.

3 Q. The period underneath that, '95 Q-2 to '96 Q-4, that's the  
4 period that you extrapolated for this carrier, correct?

5 A. Right, back in time, that's correct.

6 Q. Right. And I just want to compare, for example,  
7 Connecticut General, Q-1 '97 to Q-4 2001, that's what Chart 26  
8 reflects in terms of the colored bar where you say you had  
9 arrays?

10 A. That's correct.

11 Q. And does that seem to be generally true for the other  
12 carriers for which you had arrays? In other words, when you  
13 say in your chart, in your Table 43, that you had arrays for  
14 certain time periods, those time periods are reflected in  
15 Chart 26? You can take a look if you'd like.

16 A. Yes, from a quick -- I mean, there's obviously a lot here,  
17 but it looks reasonable.

18 THE COURT: Well, I don't understand something.

19 What's the difference between gray and blue? So if you go  
20 back, the first line in your Tab 26, the gray says "Calculated  
21 whether any difference through extrapolation." But then blue  
22 is called "Use of array from adjacent period."

23 THE WITNESS: Is it okay if I take a stab and explain  
24 that?

25 THE COURT: Yes.

1                   THE WITNESS: So, basically, suppose that I had an  
2 array for Wisconsin Physician Services in '97 quarter one and  
3 then again in '98 quarter one. Typically my examination of the  
4 data reveals that these carriers are not changing the arrays  
5 every quarter, so the allowed amounts are very stable, often  
6 remaining the same for quite a long time. And so in that  
7 period in between, I can see whether something seems to have  
8 changed, whether the allowed amounts persist, remain stable  
9 during that period.

10                  And, moreover, just suppose, for example, that in '97  
11 quarter one the allowed amount was \$9, and in '98 quarter one  
12 the allowed amount was \$10, okay, so something happened in  
13 between those two periods. And what the claims data allows me  
14 to do is look on a sort of literally day-by-day basis and see,  
15 when does the \$9 transition to something else? And when it  
16 transitions to that something else, is it transitioning to, you  
17 know, something different than \$9 or \$10? No, it's typically  
18 changing from \$9 to \$10. And in some cases it might happen in  
19 April, in other cases it might happen in December in that  
20 example, and so I account for that in the analysis by -- in  
21 those two arrays, suppose the first, in the first case the  
22 median would have moved from \$9 to \$8 and in the second case  
23 the median would have moved from \$10 to \$7. Analogous to what  
24 I did for the Medicaid analysis, I would replace all those  
25 claims, each individual claim where a paid amount was \$9 with

1       \$8, and continue that until the period when it transitioned to  
2       \$10, at which point I would replace the \$10s with a \$7, okay.  
3       And so the identifying assumption, if there was some allowed  
4       amount in there that I couldn't explain with the arrays --  
5       suppose I saw an \$11 in there or a \$4 or what have you -- I  
6       would drop that claim from the analysis. So that part of what  
7       I try to do --

8                  THE COURT: That's blue?

9                  THE WITNESS: That's the blue, though. That's what's  
10       going on in the blue.

11                 THE COURT: And how does that differ from the gray?  
12       You just took -- what's the difference between the  
13       extrapolation, or did you just take -- how did you do that? I  
14       sort of assumed you did the similar kind of process with the --

15                 THE WITNESS: Right, so going back, it is -- so there  
16       I can -- basically I am assuming that if all I see in the data  
17       are \$9s and \$10s, then those two adjacent arrays are capturing  
18       them. And to the extent that there's anything else that  
19       happens in the data, be it a paid amount of \$7 or \$11 or what  
20       have you, those get knocked out because I wouldn't have arrays  
21       for those things under this analysis.

22                 Going back in time, so for the period before, so I can  
23       see basically for '97 quarter one, that might be the first  
24       period in which I have an array. Well, let's think about  
25       December, 1996. Suppose the allowed amount in '97 quarter one

Page 20

1 is \$9. Suppose I go to December of '96 and I see it's paying  
2 \$9. So I sort of assume going back somewhat that the array is  
3 stable in that period. And then --

4 THE COURT: So it sounds like the same process?

5 THE WITNESS: It's not identical because then in some  
6 cases I'll go back beyond that \$9. And this brings in this  
7 point about what fraction of the claims are Abbott AWPs. I'll  
8 sort of look in the data to see, can I get any evidence that --  
9 so suppose there's a different paid amount, \$8.50, let's say,  
10 before the \$9, but that isn't based on that specific array.  
11 But suppose, for example, that's an Abbott AWP. That gives me  
12 comfort that they're using -- basically it shows they're using  
13 an Abbott AWP in that previous array, but I'll stop basically  
14 at a point where it's less obvious to me they're using Abbott  
15 AWPs very intensively.

16 So it's a bit different, the going back, let's say,  
17 for the Connecticut General, let's say. In some cases it will  
18 be the same. In some cases I just might go back from that  
19 allowed amount of \$9 and see, you know, and then see paid  
20 amounts that don't suggest to me that they were using an Abbott  
21 AWP prior to that. But I basically use the average for the --  
22 similar to what I do for the Medicaid analysis where I  
23 basically look at what was the difference-to-spending ratio for  
24 that product in that quarter, that very first quarter where I  
25 have data, I'll sort of move that back until it is clear it's

Page 21

1 less obvious that they're using an Abbott AWP. So I'll kind of  
2 use that ratio. So in the same way that I'm kind of -- as with  
3 the Medicaid thing that I was accounting for the fact that the  
4 spread was growing over time, here, this just chopping off  
5 those first four and a quarter years of claims is analogous to  
6 this, just I'm going to just drop them out to be conservative.

7 THE COURT: Well, is it fair to say that if you didn't  
8 have an array on either end, you called it extrapolation, and  
9 it's gray? But if you had an array on both ends, you would put  
10 it blue?

11 THE WITNESS: I didn't make this.

12 THE COURT: No, I'm trying to understand it, what the  
13 difference -- that's what took me what I didn't understand, the  
14 difference --

15 THE WITNESS: I think, I guess, in terms of explaining  
16 this --

17 THE COURT: Well, maybe you can help me.

18 MR. TORBORG: Your Honor, if I may, just to try to  
19 speed it up a little bit --

20 THE COURT: Maybe it's not important.

21 MR. TORBORG: Well, that's what I'm trying to get to.  
22 Our motion challenges the gray extrapolation. It doesn't seek  
23 to exclude the blue periods.

24 THE COURT: Yes, but they sound very similar as how  
25 he's doing it, and everyone's saying it should be ahead. So

1 they all agree that it's not, so I'll just wait and listen.

2 Q. But in terms of the periods that you had, let's look at  
3 the Connecticut General line in the chart. What you did is,  
4 when you extrapolated within that carrier -- there's  
5 within-carrier extrapolation for all these carriers above the  
6 line, right?

7 A. That's right.

8 Q. And so then in order to decide whether you felt  
9 comfortable extrapolating backwards for Connecticut General,  
10 for example, you made some kind of determination of whether  
11 that was an appropriate maneuver or not, right?

12 A. That's exactly right.

13 Q. Right. And then once you made the decision how far back  
14 you wanted to go, what you did was, you took the ratio of  
15 difference that you computed for this entire period that's  
16 colored green and blue and came up with a ratio of difference  
17 on a J-Code-by-J-Code basis, and then took that ratio of  
18 difference and applied it backwards in time against the  
19 aggregate data that you had for claims within that period,  
20 right?

21 A. That is correct. I guess I would give it a little more --  
22 give a little more detail to it than that.

23 THE COURT: All right, so that is substantially  
24 different.

25 THE WITNESS: That is somewhat different than the

Page 23

1 adjacent arrays, but I guess just the clarification that I  
2 wanted to make is that some of those gray areas that are before  
3 these periods may -- I just haven't, like, looked at this. I  
4 haven't had a chance to look at it until right now, but if I  
5 recall, in many cases when I looked back, it was the identical  
6 allowed amount. Like, in that example that I just told you,  
7 the \$9 was the allowed amount in '97 quarter one in the array,  
8 but I look in -- and that's still the allowed amount quite a  
9 ways back, and then it's something different, let's say, prior  
10 to that. So some of those grays may --

11 THE COURT: May be appropriately blue?

12 THE WITNESS: I don't know that I can do it right  
13 here, but they may be blue, given the methodology they're --

14 THE COURT: Okay, that's useful. But for the ones  
15 where you felt uncomfortable by using the adjacent arrays, then  
16 you would do this extrapolation through the percentage?

17 THE WITNESS: Right, but there were many claims, many,  
18 many claims -- and you can see this from Table 43 -- that I  
19 exclude altogether because I don't have much -- it doesn't  
20 appear that they're -- I don't have good evidence that they're  
21 using the Abbott AWP in determining their allowed amounts.

22 Q. So if we look, for example, staying on Connecticut  
23 General, Judge, the first line, in your Table 43, Doctor, you  
24 say, "I only used arrays '97 Q-1 to 2001 Q-4," right?

25 A. (The witness nodded affirmatively.)

Page 24

1 Q. And so that being your exhibit from your report, if we  
2 look at the period before 1997, you were not in fact using  
3 adjacent -- you weren't using any arrays? You were  
4 extrapolating, right?

5 A. Is it okay if I take a minute just to --

6 Q. Sure.

7 THE COURT: Yes.

8 A. Because if we're going to drill down on a specific, I just  
9 want to make sure that --

10 (Discussion off the record.)

11 A. Okay, that's correct, in the instance for Connecticut  
12 General, right. That's correct, in this instance for  
13 Connecticut General, that is --

14 THE COURT: What's the question again?

15 MR. DALY: The question was, Judge, we were trying to  
16 clarify this point that we were working on, which is these gray  
17 boxes in Line 1 of Connecticut General.

18 Q. Just to confirm, Doctor, comparing that to your Table 43,  
19 your testimony is that prior to 1997, you did not use any  
20 arrays, so that those gray boxes are extrapolation, not the use  
21 of adjacent arrays, correct?

22 A. That is correct. I'm using the array, the information  
23 contained in the subsequent arrays to estimate what the  
24 difference was in the preceding year and a half.

25 THE COURT: But did you use just a flat percentage, or

Page 25

1 did you use your subjective judgment by looking at the adjacent  
2 arrays?

3 THE WITNESS: So basically what I did, let's just take  
4 a particular J-Code, J 70-50. Suppose that for that J-Code the  
5 ratio of difference to spending during that five-year period  
6 when I had arrays was 20 percent, okay. And it bounces around  
7 somewhat, more in the case of Medicare than in Medicaid. So I  
8 average across the arrays, partly because of this bouncing  
9 around, which is less --

10 THE COURT: That's fine, I just want to understand.

11 So you applied a percentage?

12 THE WITNESS: Right, I applied a percentage to that  
13 preceding year and a half, and then knocked out and applied  
14 zero to the preceding four and a half years.

15 THE COURT: All right, so you did use a percentage.

16 THE WITNESS: Yes, that's exactly what I did, yes.

17 Q. So it was a simple average of the years that you had  
18 arrays for. Like, your example, let's say it was 20 percent,  
19 you would take that 20 percent and apply it to the period that  
20 you were extrapolating for for that J-Code, right?

21 A. Correct.

22 Q. And I believe yesterday you talked about in Medicaid, that  
23 when you went backwards in time, you applied some sort of  
24 scaling factor to it to take recognition of the fact that the  
25 spreads were lower in the earlier years. Do you recall that

1 testimony?

2 A. Yes, I do.

3 Q. And you did not do that with this Medicare extrapolation  
4 backwards, did you?

5 A. I didn't do that same thing, but I did something that is  
6 arguably more -- you know, I did something similar in spirit in  
7 the sense that I knocked out the first -- I zeroed out the  
8 190,000 claims in the first five and a quarter years, so in a  
9 similar -- I mean, it -- in the same way that sort of going  
10 back in time in Medicaid, I could have used that percentage and  
11 applied it back to 1991 quarter one. I specifically didn't do  
12 that because my examination of the data suggested that was not  
13 an appropriate thing to do. So if we look in this case, I  
14 examine 130,000 claims for the extrapolation but drop 190,000  
15 claims, so I'm effectively scaling it down by 60 percent.

16 Q. So in effect you're scaling down just by lopping off a  
17 couple of years, right? Is that your testimony?

18 A. I would say that it is scaling down the percentage for  
19 that five years, applying that to seven quarters and dropping  
20 seventeen quarters.

21 Q. Just dropping the quarters?

22 A. In the same way that I dropped the claims for the six  
23 J-Codes that we discussed yesterday, that I guess I discussed  
24 yesterday, a similar dropping here; difference equals zero for  
25 those 190,000 claims.

1 Q. So when it comes to Medicare, dropping a couple of years  
2 is a stand-in for your scaling factor, right?

3 A. I guess I wouldn't -- so, first, I wouldn't call four and  
4 a quarter a couple, and it's -- I mean, the applications differ  
5 somewhat, and it is similar in spirit. The determination -- I  
6 mean, I think the very first thing that I said yesterday was  
7 that Medicaid and Medicare difference in one very significant  
8 respect, and this is an adjustment methodology that is tailored  
9 to the details of this application.

10 Q. And isn't it true that when you looked at some of the data  
11 for the early years for Connecticut General, for example, you  
12 found that the Abbott price only appeared in the arrays, like,  
13 1.2 percent of the time, and so you felt uncomfortable  
14 extrapolating backwards to too early a time period, the early  
15 '90s? Isn't that your testimony, sir?

16 A. Yes, 1.2 rings a bell. I think that -- let me just see  
17 here if -- but there was a low percentage in those first  
18 seventeen quarters, and I think the corresponding -- I don't  
19 know, I can't remember the other corresponding percentage here,  
20 but that there was -- you know, this fraction of claims with an  
21 Abbott AWP bounces around somewhat, but I think it was, yes,  
22 only about 1 or 2 percent in those first four and a quarter  
23 years for this specific carrier, and thus it could --

24 Q. And that's why you dropped the first four and a half  
25 years, right?

1 A. The first four and a quarter, the first seventeen  
2 quarters, that's right.

3 THE COURT: Did you extrapolate backwards for those  
4 quarters for the other carriers?

5 THE WITNESS: So I tried to scrutinize the paid  
6 amount, so I essentially did programs carrier by carrier. So I  
7 did a Connecticut General program in which I sort of looked at  
8 year by year so I can see the allowed amounts that are being  
9 paid in '97, '98, '99, and so forth, and so for Connecticut  
10 General in this application, I went back to '95 quarter two.

11 In other instances, I didn't go back by that same amount  
12 because perhaps I saw the Abbott -- the details vary a little  
13 bit, and I explain it in a lot of detail in the report, but the  
14 idea, the big-picture idea is that if I look back, so I take  
15 this use of the Abbott AWP, this presence of the Abbott AWP as  
16 an allowed amount as a demonstration that they're using the  
17 Abbott products in these arrays in this preceding period. As  
18 we discussed yesterday, more often than not, when Abbott is in  
19 the array and affects the median, they're not the median, but I  
20 take that as an indicator of whether -- you know, it's not a  
21 perfect indicator, I'll concede, but it's a way to sort of  
22 gauge, is this carrier using Abbott products? And it's worth  
23 noting that these five J-Codes, four of them are for sodium  
24 chloride, and so to the extent that they're using an Abbott AWP  
25 for the J 70-50, there's a pretty strong correlation, if you

1 look across carriers within the same quarter, if they're using  
2 Abbott and Baxter and Braun -- I can't remember all the  
3 companies -- but if they're using them in the J 70-50, the  
4 firms' products, they tend to be using them in the 70-40, the  
5 70-30, and the 70-60 as well. So I did -- Wisconsin Physician,  
6 I went back an extra quarter, partly because of what the data  
7 showed.

8 Q. And so if we keep on Chart 26, Tab 26, the carriers above  
9 the line that you had some arrays for, those were the sample  
10 that you used to extrapolate to all the carriers that you had  
11 no arrays for below the line, right?

12 A. That's correct.

13 Q. And that sample above is what was available to you,  
14 correct?

15 A. The arrays for the sample above are, yes, what was  
16 available to me, correct.

17 Q. Let's take a look at some of these years that we're  
18 talking about. The damage period here is '91 to 2001, to your  
19 understanding, right?

20 A. That's my understanding.

21 Q. So for all of these carriers when you look -- you know,  
22 '91 isn't even on the chart. In '91 you calculated no damages,  
23 right?

24 A. Right.

25 Q. '92 you calculated no damages for any carrier, correct?

1 A. Correct.

2 Q. Now, '93 you also have no arrays for any carrier, correct?

3 A. Yeah, I haven't scrutinized this, but that looks from what  
4 appears on this --

5 Q. On the chart?

6 A. Yes, on the chart.

7 Q. If you want to check, look at your Table 43, and I think  
8 you'll find that there's no indication of any arrays for the  
9 year 1993.

10 A. Correct, okay.

11 Q. Is that correct?

12 A. Correct.

13 Q. And without any arrays, you were still able to extrapolate  
14 damages. Both above the line for other Metra Health and  
15 Florida Blue Cross-Blue Shield, you see yourself calculating  
16 damages for that time period for the year 1993 for those two  
17 carriers that you had some arrays for but not for this year?

18 A. Can you repeat?

19 Q. Sure. If you look at the chart or look at your  
20 Exhibit 43, if you look at the year 1993, you had no arrays  
21 from any carrier, correct?

22 A. That's correct.

23 Q. And yet you calculated damages for some of the  
24 above-the-line carriers that you had other arrays for and all  
25 of the carriers below the line for which you had no arrays

1 whatsoever, right?

2 A. That's correct. I guess I would want to explain what  
3 underlies this, but --

4 Q. Now, for some of the carriers above the line that you had  
5 arrays for, if you look at other Metra Health, other Region 5,  
6 and even Connecticut General, those are three carriers that you  
7 did have arrays for, right, from other periods? Right?

8 A. Yes.

9 Q. And yet you did not extrapolate backwards for them, even  
10 though you had some arrays for them, right, for this time  
11 period of 1993?

12 A. Correct.

13 Q. Because, as you discussed earlier, they only appeared very  
14 infrequently in the data, and you didn't feel comfortable  
15 extrapolating backwards for those carriers, right? Is that  
16 right?

17 A. I think the -- yes, the explanation was -- the idea was  
18 that the Abbott AWP was not appearing as an allowed amount. I  
19 discuss it. It's -- you know, I don't remember the details of  
20 each of the seven analyses that I go into detail on in the  
21 report, but the idea is --

22 Q. So you didn't do it for those carriers above the line that  
23 you had arrays for for 1993, but you did do it for all of the  
24 carriers below the line that you had no arrays for at all,  
25 right?

1 A. That's correct, and there's an explanation for that that  
2 I'm happy to talk about.

3 Q. Well, the sample for the extrapolation that you did below  
4 the line is the arrays above the line, right? Is that correct?

5 A. The information that I use -- I mean, it is the data, so  
6 it's a combination of the arrays applied to the data across,  
7 you know, millions of claims, and then using that to estimate  
8 for the other group. Now, as I outline in the report, the  
9 reason that I went back to early '93 in the case of these other  
10 carriers was that a careful examination of the data for them  
11 reveals that those carriers, these, you know, twelve or so  
12 carriers, are much more likely, significantly more likely  
13 during that early period to be using Abbott AWPs. So I don't  
14 remember the percentages offhand, but in contrast to some of  
15 the ones above, the ones that are below, I think it may have  
16 been 24 percent of the allowed amounts for these other carriers  
17 in the early, let's say, '93-'94 period were Abbott AWPs. So  
18 if anything, for these carriers, we talked yesterday about how  
19 the intensity with which these other carriers were using the  
20 Abbott AWPs in this later period was lower than for the sample  
21 carriers, but that wasn't true for the early period.

22 Q. Right. But when you do extrapolate for them, you  
23 extrapolate from not a single array in 1993, right?

24 A. That's correct.

25 Q. And you said that above the line you knocked off these

1 extra quarters where you didn't see a lot of use of an Abbott  
2 price in the array or the purchase price, right?

3 A. As the allowed amount, if the Abbott AWP -- right.

4 Q. And that was your scaling, that was a way to scale the  
5 results, correct?

6 A. Correct, to adjust. I guess I would -- yes, to adjust the  
7 data to account for the fact that the claims administered by  
8 those first seven carriers are not perfectly representative of  
9 the remaining ones. It's an adjustment methodology.

10 Q. But when you extrapolate from all the other arrays that  
11 you have for later time periods above the line, and you're  
12 taking those ratios of differences and applying them to these  
13 early years for the carriers where you have no arrays, that  
14 scaling is not being transferred to the carriers below the  
15 line, is it?

16 A. I guess I would disagree in the sense that -- can I take a  
17 minute to refresh my memory on some stuff?

18 Q. Sure.

19 THE COURT: Actually, if we have everyone here, this  
20 might be a good moment to do the switch-over. How much longer?  
21 How much do you have left, do you figure, Mr. Daly?

22 MR. DALY: As much time as we have left today, Judge,  
23 I'm afraid, although it's going to move along pretty quickly.

24 THE COURT: Well, we're going to finish him today,  
25 so --

1 MR. DALY: Yes.

2 A. So I guess I would --

3 THE COURT: Why don't we finish up this one thing, and  
4 then we'll do the switch.

5 A. So I guess I would not agree that I'm not scaling in that  
6 earlier period. You'll see that it's -- I know there's a lot  
7 of numbers floating around, so please interrupt me if I'm not  
8 explaining it well. So yesterday I had mentioned that from '95  
9 quarter three to 2001 quarter four -- I'm just going to throw  
10 you some round numbers just to keep it fairly simple. Suppose  
11 that 24 percent of the claims in my sample had an Abbott AWP as  
12 the allowed amount, and suppose 16 percent of the other  
13 carriers --

14 MR. DALY: Can I interrupt at this point, Judge,  
15 because that's another thing that we're going to talk about.  
16 I'm talking about --

17 THE WITNESS: But I'm trying to explain the  
18 specific -- I just disagree with one thing that you said  
19 earlier, so I'm just trying to clarify what I mean. I'm just  
20 trying to help the Judge.

21 Q. Well, but I want to focus on the two years or the four and  
22 a half quarters that you knocked off which you said was --  
23 that's one of your scaling factors, right?

24 A. But --

25 Q. Is that right?

1 A. I guess I'm -- I'm -- I'm --

2 THE COURT: At this point we're breaking. So let me  
3 just ask. We don't even need this -- well, actually we should  
4 have this on the record. So am I right that if you had an  
5 array, it was either red, yellow, purple, or green?

6 MR. DALY: Yes, your Honor.

7 THE WITNESS: Or blue. Oh, yeah, yeah, the blue. If  
8 with that assumption, the blue.

9 THE COURT: So I don't know why there are all  
10 different colors, but at least I can assume that red, yellow,  
11 purple, and green are where you actually had an array?

12 MR. DALY: Right, Judge.

13 THE COURT: Is that how you did this? And then if  
14 it's half red and half gray, it's because you only had for some  
15 J-Codes and not others?

16 MR. DALY: That's right, Judge.

17 THE WITNESS: Right.

18 THE COURT: Okay. All right, and then I know blue and  
19 gray. Fine, thank you, all right.

20 (A recess was taken, 2:59 p.m.)

21 (Resumed, 3:25 p.m.)

22 THE COURT: Now, isn't that inspirational to you all  
23 to try and get together and --

24 (Laughter.)

25 THE COURT: No?

1 MR. HENDERSON: Did I dodge the bullet, your Honor?

2 THE COURT: Huh?

3 MR. HENDERSON: Did I dodge the bullet okay?

4 THE COURT: You went to grad school up here, right?

5 THE WITNESS: I did. I grew up around here.

6 THE COURT: Where did you grow up?

7 THE WITNESS: A half hour north, Lynnfield.

8 THE COURT: So it isn't too much of a big deal coming  
9 back here, huh?

10 THE WITNESS: No. My family doesn't know I'm here,  
11 though, so don't tell them.

12 (Laughter.)

13 THE WITNESS: Is it okay if I just finish up? I was  
14 trying to explain a point before.

15 THE COURT: Yes, yes, go ahead.

16 THE WITNESS: So there's the arrays, the carriers for  
17 which I have arrays, and if I look at the claims -- remember,  
18 the array is one set of data, but the claims are a very  
19 powerful set of data as well because I can scrutinize what's  
20 going on in the claims data. So I take the information for  
21 those carriers where I have the arrays, and 24 percent of the  
22 time Abbott's allowed amount -- the allowed amount is an Abbott  
23 AWP. Then we look at these other carriers during that same  
24 period, '95 quarter three forward, the same, and for them the  
25 corresponding percentage is, like, 16 percent. So --

1 THE COURT: 16 percent is what?

2 THE WITNESS: 16 percent of the claims have an Abbott  
3 AWP as the allowed amount.

4 THE COURT: But can I just say this? So one way, if I  
5 don't totally go with that, you would say that at the very  
6 least, the 24 percent is on the mark because it's AWPs?

7 THE WITNESS: Those are Abbott AWPs.

8 THE COURT: So that's how in the earlier quarters you  
9 know for sure that you're a hundred percent certain for  
10 24 percent of them?

11 THE WITNESS: So I'm a hundred percent sure for a  
12 hundred percent of them where that 24 number comes.

13 THE COURT: Right, yes, you're sure of a hundred  
14 percent of the ones where the Abbott AWP is actually what the  
15 claims are being paid out at?

16 THE WITNESS: Right.

17 THE COURT: All right. And the ones that you're  
18 extrapolating from are the ones where that is not the AWP?

19 THE WITNESS: No. I think I want to step back just a  
20 little bit.

21 THE COURT: All right, so I don't get that because I'm  
22 looking at the gray. I think this is a confederacy, okay, so  
23 I've got the gray. So in the gray --

24 THE WITNESS: So let's think of three different  
25 carrier array -- three different examples.

1           THE COURT: All right.

2           THE WITNESS: So Wisconsin Physician in '98, let's  
3 imagine them where I have some arrays, okay? And then I look  
4 across. So that's an example of what I'm going to be talking  
5 about now when I go to this 24 percent number.

6           THE COURT: All right.

7           THE WITNESS: So look at all of those claims for which  
8 I have right in front of me the underlying array, and what I  
9 observe is that in 24 percent of cases, the median in those  
10 arrays and in the data is an Abbott AWP. But I have those  
11 arrays. There's nothing about extrapolation there.

12          THE COURT: Right.

13          THE WITNESS: Okay. Now these other carriers where I  
14 don't have array information, for them, that corresponding  
15 number is like 16 percent, so it's lower, less often these  
16 other carriers. So forget -- this is just going across. This  
17 is like Wisconsin Physician --

18          THE COURT: When you say "across," you mean down?

19          THE WITNESS: Yes, down, exactly.

20          THE COURT: You know, do you see the screen?

21          THE WITNESS: Yes, I do.

22          THE COURT: You can touch it, and it moves down. All  
23 right, see, beautiful.

24          THE WITNESS: So right down here, this is 16 percent  
25 in here.

1 THE COURT: 16 percent of the --

2 THE WITNESS: The claims.

3 THE COURT: -- claims are being paid at AWP?

4 THE WITNESS: Abbott's AWP.

5 THE COURT: All right.

6 THE WITNESS: Okay? So it's lower than in the up  
7 above it, okay? And I just down to account for that.

8 THE COURT: So of those 16 percent, you're a hundred  
9 percent sure it's certain?

10 THE WITNESS: I think there are going to be -- there  
11 is inevitably going to be an example or two where there's both  
12 an Abbott and a Baxter with a 10.03.

13 THE COURT: So for 16 percent of the gray below the  
14 line, you've got a pretty high degree of certainty?

15 THE WITNESS: That's right, that's right, in the '95  
16 quarter three forward period, okay? And so if you think about  
17 halfway through the time period essentially.

18 Now, a little bit before, if you go to '93 and '94 and  
19 the first half of '95, it turns out that those other carriers  
20 are having Abbott AWPs as their allowed amounts even more  
21 often. So it appears that --

22 THE COURT: The other carriers, by which you mean  
23 below the line?

24 THE WITNESS: North Dakota, below the line.

25 THE COURT: Below the line.

1                   THE WITNESS: Yes, exactly. And so what I'm doing  
2 there is, I am basically applying that -- it is true that I'm  
3 calculating some difference in '93 and '94 for those other  
4 carriers, but it is also true that I'm scaling it down by this  
5 16 to 24 ratio. It turns out there's 22 percent of claims in  
6 that -- for those below the line are being paid at an Abbott  
7 AWP. So it appears, if anything, this later period is -- so  
8 I'm in a sense scaling down those earlier claims more  
9 aggressively to, you know, account for -- to penalize it for  
10 the fact that I don't have array information, for example, in  
11 '93. But the data --

12                  THE COURT: All right, you know what, he's got to  
13 actually ask his questions.

14                  THE WITNESS: Yes, I know, but I just wanted -- I  
15 guess it's somewhat complicated.

16                  THE COURT: It's very complicated.

17 BY MR. DALY:

18 Q. And I think it's not clear yet because when you say you're  
19 a hundred percent sure of the 25 percent, a hundred percent  
20 sure of what?

21 A. So for each array that I observe, I can see the AW -- so I  
22 think it needs a little bit of background?

23 Q. Well, I'm just trying to -- a hundred percent of your  
24 damage calculation or a hundred percent sure that an Abbott  
25 price was in the array?

1 A. So with the caveat that I mentioned a second ago,  
2 reasonably certain, close to a hundred percent certain that it  
3 is an Abbott AWP that is in that array, in the sense that that  
4 is the -- and, you know, inevitably I just caveated it for the  
5 reason that I mentioned, but the --

6 Q. But knowing that an Abbott AWP is in the array doesn't  
7 tell you anything about damages, does it?

8 A. I guess I would disagree with that.

9 Q. Well, you're coming in as an expert on damages, right, in  
10 this case?

11 A. That's right, that's my understanding, yes.

12 Q. And that an Abbott price is in an array by itself tells  
13 you nothing about damages; isn't that correct?

14 A. But --

15 Q. Is that correct or not?

16 A. That's correct, but it's not synonymous with what we were  
17 just talking about because if the Abbott AWP is the median --  
18 so you can take an example, and you can inevitably --

19 Q. Just to be clear, if you see an Abbott price in the data,  
20 then you're saying that that's telling you that the Abbott  
21 price was the median, right?

22 A. Correct, with that caveat.

23 Q. But knowing that Abbott's price was the median doesn't  
24 tell you anything about how much the median moved when you  
25 substituted the new ASP for the Abbott price, does it?

1 A. I would argue that it sheds a considerable amount of  
2 information on that, so I guess I would disagree. I think  
3 that's wrong.

4 And just to clarify one thing that you said about using  
5 the average sales price, that's not -- I mean, we went through  
6 a lot of info yesterday where that's not the price, that's not  
7 the Abbott price that I'm using. I'm using a very scaled  
8 version of the average price.

9 MR. DALY: Your Honor, I have a couple of, if I may  
10 approach --

11 THE COURT: Yes.

12 MR. DALY: A couple of additional exhibits.

13 THE COURT: Good. Thank you.

14 (Exhibit 2 marked for identification.)

15 Q. Dr. Duggan, I've handed you an array prepared by Myers &  
16 Stauffer. Those are your consultants on this project, right?  
17 Is that correct?

18 A. At my direction, they prepared array information.

19 Q. Right. And this is an array for Travelers, also known as  
20 Metra Health, right? It says it at the bottom of the footer,  
21 correct?

22 A. I'm trying to find where it says Metra Health. Oh, in the  
23 footer, okay, yes.

24 Q. And that is one of the carriers that you had arrays for,  
25 right?

1 A. That's correct.

2 Q. And in this array, if you look at the top, April, 1997,  
3 we're talking about J-Code 70-50, which is the biggest damage  
4 J-Code in the case, right? Do you see that?

5 A. 70-50 I think is the biggest spending. I don't know if  
6 it's the biggest damage, the biggest difference.

7 Q. The biggest spending?

8 A. But it's the biggest spending.

9 Q. Okay, and that's what this is an array for, right?

10 A. That's what it looks like.

11 Q. Okay. Now, if you look at the three prices in the array,  
12 there's an Abbott, a Baxter, and a McGaw. Do you see that?

13 A. That's correct.

14 Q. And Abbott's price is the median, right?

15 A. Correct.

16 Q. And so you see the median being calculated at 10.03. You  
17 substitute in a new price for the 10.03, and Abbott's price is  
18 then 118, and we have a new median, right? And the new median  
19 is --

20 THE COURT: You just lost me if you're going so fast,  
21 so --

22 MR. DALY: I'm sorry. The way these work, Judge, is,  
23 on the top we have three prices, 10.03, 9.67, 12.30. Do you  
24 see that on the '97 one?

25 THE COURT: All right, '97. I'm looking at '96. All

1 right, that's fine, okay.

2 MR. DALY: And the Abbott price, the \$10.03, that's  
3 the median in this calculation. That's the array that the  
4 carrier was using. And then below, what happens is that Myers  
5 & Stauffer and Dr. Duggan substitute in a new price for Abbott.  
6 That's the 118 that you see there?

7 THE COURT: I see it, yes.

8 MR. DALY: And then that makes the 9.67 the median  
9 because now Abbott's, instead of being the median, it's the low  
10 price.

11 THE COURT: Okay.

12 Q. And so what happened here, Dr. Duggan, is that in this  
13 example the price moved from -- the median moved from \$10.03 to  
14 \$9.67, which is 36 cents, right?

15 A. Correct.

16 Q. And, now, did I hand you the other exhibit? Did I hand  
17 you July of 1996?

18 A. I don't think you did.

19 Q. Here we go.

20 MR. DALY: We'll mark that as Exhibit 3 for today.

21 (Exhibit 3 marked for identification.)

22 MR. DALY: And, Judge, that's the other one. That's  
23 the 1997 one.

24 THE COURT: But what's the point of what you just did?

25 MR. DALY: The point is going to be made right now --

1                   THE COURT: All right.

2   Q. -- which is that this is the same carrier, the same  
3   J-Code, just a different time period, right? Is that right,  
4   Doctor?

5   A. I'm just trying to -- there's a lot of information here.

6   I'm just trying to --

7   Q. Sure. Well, these are the documents you worked with.

8   Right?

9                   THE COURT: Yes, but there are thousands of them,  
10   so let's just --

11   A. Just give me a second. I'm just trying to. . .

12                   (Witness examining documents.)

13   A. Okay, got it.

14   Q. So on this document, this is the same carrier,  
15   Metra Health, as you can see on the footer, the same J-Code,  
16   70-50. And in this case a year later, what you have is a  
17   situation where Abbott is once again the median, right?

18   A. Correct.

19   Q. The median is 955. And when you substitute in a new price  
20   for the median, the median is now 496 instead of 995, right?

21   A. Correct, 955.

22   Q. Pardon?

23   A. 955, but, yes, that's right.

24   Q. And that's like a 48 percent difference? That's like \$5  
25   difference, right?

1 A. Yes.

2 Q. And it's because the damage calculation depends on what's  
3 in the array, right?

4 A. Correct.

5 Q. And so knowing simply that an Abbott NDC is part of the  
6 array doesn't tell you anything about how much damage there is  
7 from you substituting in a new ASP into the array, correct?

8 A. On a specific array, that is correct. I guess I would  
9 just add --

10 Q. Well, on any array. In other words, just take any array  
11 in the world. There could be five NDCs in it, and some of  
12 these J-Codes would have four, five, six, seven, eight NDCs in  
13 them, right?

14 A. I guess --

15 Q. Right? Is that true?

16 MR. LAVINE: Your Honor, could we let the witness  
17 answer the questions? He keeps getting cut off over and over  
18 again.

19 THE COURT: Although, you know, we've got to finish.  
20 We've got to finish.

21 Q. J-Codes can have three, four, five, six, seven, eight NDCs  
22 in them, right?

23 A. Correct.

24 Q. Pick any one that you've ever seen, and I'll tell you that  
25 Abbott's median price was \$5.83, okay? Will you accept that

1 for purposes of illustration?

2 A. Abbott's AWP was \$5.83?

3 Q. The Abbott price used in the array was \$5.83.

4 A. Okay.

5 Q. Okay. Tell me what the damages are when you substitute in  
6 a new price.

7 A. That's why I sort of qualified it. In a specific array  
8 for a specific claim, it's going to depend on which other  
9 products are included in the array.

10 Q. Exactly. So as in the two examples that we just looked  
11 at, it might be 33 cents in one case, it might be \$5 in the  
12 other case. It depends on what's in the array, as you just  
13 said, right?

14 A. Right. And that's exactly why I tried to leverage  
15 information from many arrays, from many carriers, and take  
16 account of the fact that there is heterogeneity across  
17 products. So, for example, the 33-70 product, the vanco  
18 product, tends to have much bigger differences, so I'm  
19 averaging across many arrays for 33-70. Some will be low, only  
20 a minor difference; others will be high. But, you know, in the  
21 same way as with Medicaid, in some cases an estimation will be  
22 high, in some cases it will be low; but that's why I leverage  
23 information from dozens and dozens of arrays and from millions  
24 and millions of Medicare claims to estimate what the difference  
25 is in these other periods.

1 Q. But the mere fact that it's in there -- and now we're back  
2 to your 25 percent/16 percent thing that you were talking to  
3 the Judge about -- the mere fact that it's in there doesn't  
4 tell you whether it moved \$5 or 33 cents, correct?

5 A. Correct.

6 Q. Or one cent or \$10, right?

7 A. Correct.

8 Q. Thank you. Take a look, if you would, at Exhibit 35,  
9 which is in the big book that I gave you earlier when we  
10 started today, in here.

11 A. And so --

12 Q. Tab 35.

13 A. Tab 35?

14 Q. Yes.

15 MR. DALY: This is in the book we started with, your  
16 Honor.

17 Q. Do you have that, sir? Now, these are two arrays for  
18 J 70-50, which I believe you discussed in your report. And the  
19 point of this, again, is that here's a couple of examples where  
20 in the one situation you have J 70-50 again, the largest  
21 expenditure drug. The Cigna array has three participants in  
22 it, right?

23 A. Correct.

24 Q. And the WPS array for the same J-Code, same quarter, has  
25 six in it, right?

1 A. Correct. Is that the same period? I just don't see any  
2 indication of the timing on the Wisconsin Physician one, but --

3 Q. Well, if you want to, we can look back. It's 97 to 105 of  
4 your report.

5 A. No, that's fine.

6 Q. But when you substitute in here, what you end up with,  
7 again, is an example where in the one situation it drops from  
8 1069 to 911, which is a 14, 15 percent increase; and in the  
9 other situation, the WPS, it changes from \$11 to \$5.82, which  
10 is a 47.8 percent difference. Do you see that?

11 A. Yes.

12 Q. And that again is a fact that's dependent on which NDCs,  
13 which other companies' drugs are in the array and at what  
14 prices those drugs are at, right?

15 A. Correct.

16 Q. Okay. And if you would turn for a moment to Tab 27 in the  
17 book that we gave you this morning, these, Doctor, are what you  
18 call your DIFF-FRACs, your ratios of difference for each of the  
19 carriers for J-Code 70-50. Do you see that? And these, I've  
20 included all the backup in there. This comes from, as you see  
21 from the bottom of the page --

22 MR. DALY: And this is not an analysis, Judge. This  
23 is simply a demonstrative based on his data, but the source of  
24 this is from your reliance materials.

25 MR. LAVINE: And just to preserve the objection,

1 Judge, we haven't seen this till just now, but --

2 THE COURT: Why does this keep happening?

3 MR. DALY: Judge, this is just a demonstrative on his  
4 data.

5 THE COURT: Yes, but, excuse me. These numbers are  
6 hard. I don't know why this wasn't handed to the other side.

7 MR. DALY: Well, we were working on it, Judge.

8 THE COURT: When?

9 MR. DALY: Over the last week.

10 THE COURT: Yes, but you should have given it to them.  
11 You were screaming foul when you got something two weeks ago.

12 MR. DALY: That was a new analysis, Judge. This is  
13 simply --

14 THE COURT: No, but you've got to give it to them.

15 Are there any other new things?

16 MR. DALY: Very well, Judge.

17 MR. LAVINE: There are several in the book.

18 THE COURT: Well --

19 Q. Well, Doctor, you didn't create -- in your reports, in  
20 none of your reports is there a table of the DIFF-FRACs, the  
21 ratios of difference that you created for each carrier for each  
22 J-Code, is there?

23 A. Not that I recall. There are a lot of tables, but this  
24 one isn't one that I recall.

25 THE COURT: You can't pop this on people. I can't

Page 51

1 even read it as fast as you're asking questions on it. What is  
2 it? I don't understand what it is.

3 MR. DALY: Your Honor, this is simply -- these are  
4 the -- remember when the witness testified earlier that he  
5 calculated these ratios of difference for each J-Code for each  
6 quarter, and then extrapolated them backwards, and then  
7 extrapolated them to the carriers below the lines. These are  
8 those actual fractions plucked out of his data. This is from  
9 his data.

10 THE COURT: Do you recognize these?

11 THE WITNESS: I worked with this -- I worked hard to  
12 do -- there's a lot of numbers in this analysis. I've never  
13 seen the data presented in this way, so it is -- I mean, I  
14 deploy this kind of data in my analysis.

15 THE COURT: The objection then is sustained. You've  
16 got to give people advance notice on this stuff.

17 MR. DALY: Very well, Judge.

18 THE COURT: The other one was pretty self-explanatory  
19 pretty quickly. If he can't verify it as true, I can't let you  
20 ask questions about it.

21 Q. Doctor, we did include the backup material from your --

22 THE COURT: I know, but he doesn't have time to go  
23 through it.

24 MR. DALY: Oh, I see. Very well, Judge.

25 THE COURT: Your expert will have to do it.

1 Q. Doctor, I'd like to shift gears and talk a little bit  
2 about Medicaid.

3 A. Okay.

4 Q. Now, yesterday you were talking a little bit about some of  
5 the MAC data that you had or MAC information that you saw in  
6 some of the data relating to some of the states that were used,  
7 both in your calculation of claims data and your extrapolations.  
8 do you recall that testimony generally?

9 A. Right, discussion of -- yes, the discussion of MACs. I  
10 don't know what specific part of it you're talking about.

11 Q. My question is, you included difference calculations and  
12 difference damages for claims that were based on MACs in your  
13 difference calculations and your damage calculations, correct?

14 A. In certain instances, yes.

15 Q. Well, are there any instances in which you took them out?

16 A. Well, as I had described in my report, there are many  
17 instances in which I dropped claims because -- so I'm sure some  
18 of -- it seems plausible that some of them include MAC claims;  
19 but the analysis would account for, to the extent the MAC was  
20 lower than, let's say, the AWP, the analysis would account for  
21 that.

22 Q. But you made no specific adjustment to your analysis to  
23 account for claims that were based on MACs, right?

24 A. I don't agree with that.

25 Q. All right. Well, what specific adjustments did you make

1 to account for the fact that many payments made by the states  
2 were based on MACs?

3 A. So yesterday I gave, you know, in talking about, let's  
4 say, vanco, a product that had an AWP of, depending on the  
5 product, let's say 60, when the 125 percent of the average  
6 pharmacy price was, I don't know, 6, let's say, a 10-to-1  
7 ratio. But in some cases a state might have a MAC in effect.  
8 Instead of paying AWP minus 10, it would pay 20. So instead of  
9 paying 60 or 54, which would be AWP minus 10, it might pay 20.  
10 So in carrying out my analysis, when calculating the  
11 difference, it would not -- every claim would take account of  
12 that because it would basically, the difference would be the  
13 difference between the MAC and the amount that would result if  
14 the Abbott price were used rather than -- so every -- the  
15 analysis absolutely accounted for that.

16 Q. Well, and by that, you mean that when you did your  
17 analysis you would subtract your recalculated ASP from the  
18 amount that the state paid, right? And the amount that the  
19 state paid might have been based on a MAC, right? Is that what  
20 you're saying?

21 A. Right. I mean, it was somewhat more complicated than  
22 that, but if we ignore all the dispensing fees and so forth,  
23 that basically in that example, if the state was paying 20  
24 instead of the AWP of 60, I would only do 20 -- calculate 20  
25 minus 6 for that specific claim. So that's accounted for

1 in numbers.

2 Q. So in your difference calculations and your damage  
3 calculations, there are dollars in there that relate to claims  
4 paid by states based on MACs?

5 THE COURT: Just the differential, right? Or is that  
6 wrong?

7 MR. DALY: Right.

8 THE WITNESS: Just the differential, that's right,  
9 just the differential.

10 Q. And you did no analysis to determine what effect, if any,  
11 any Abbott price had on a state MAC, correct?

12 A. That is correct. That's something we could have -- I  
13 mean, it is something that -- it's part of the reason that we  
14 dropped the Ohio from the analysis had to do with the MAC  
15 issue.

16 THE COURT: Which is what?

17 THE WITNESS: So Ohio was a state that used MACs  
18 during this period, and it turns out that the MAC, even if --  
19 so to go back to that earlier example, if the Abbott price was  
20 6 and the AWP was 60 and they had a MAC of 20, even if Abbott  
21 had reported 6, you know, to First Databank and that had gone  
22 to Ohio, they would have deployed 20, they would have used 20.

23 THE COURT: But in all the other states, is it a lower  
24 than?

25 THE WITNESS: It's a lower than. So that's exactly

1 why we removed Ohio.

2 Q. And when you did your 10-state sample, the states that you  
3 had some data for, you originally included Ohio in the states.  
4 There were 11 to begin with, right?

5 A. Ohio was originally one of the states, right.

6 Q. So when you did your calculus of the 10 states that you  
7 then applied to the other 38, Ohio was in that calculation,  
8 right?

9 A. Correct.

10 Q. And including Ohio in that calculation because it was a  
11 MAC state served to lower the differences and the damages in  
12 the 11 states, right?

13 A. That's true, yes, to some extent.

14 Q. And so when you took Ohio out, your damages actually went  
15 up?

16 A. Not in the aggregate, no.

17 Q. -- per state on an average basis?

18 A. No. So I don't remember the exact numbers, but I think  
19 the numbers were along the lines of, Ohio coming out lowered  
20 the federal difference by 3, but then it raised the federal  
21 difference by I think about 1 million for the remaining states,  
22 so it offset a little bit of it, so -- but having dropped Ohio  
23 from the analysis, as I would do, and, you know -- yes, so, in  
24 any case, that's right, but it did rise somewhat.

25 Q. Okay. And just to clarify, you haven't done any analysis

1 to see what Abbott pricing, what effect any Abbott pricing had  
2 on any state MACs, right?

3 A. That was not a focus of my analysis, no.

4 Q. Now, California had a MAC program, didn't it?

5 A. In certain periods.

6 Q. And were you in communication with California about  
7 whether MACs should be included in your analysis?

8 A. I was not in conversation with California, no.

9 Q. Were other folks working under your direction and control  
10 in contact with them?

11 A. At my direction, Myers & Stauffer did an incredible amount  
12 of research on the adjudication methodologies that were  
13 employed by the various states. And you may note from my  
14 Table 25, which is sort of a big-picture summary of the first  
15 10 states, that in California I only went back to the second  
16 quarter of 1994 because of other things going on in California  
17 in the first thirteen quarters of the analysis period.

18 Q. And that was because there was MAC data in those early  
19 years that you couldn't separate?

20 A. No. I'm not sure -- it is -- I was --

21 Q. Let's take a --

22 A. Can I just finish? I was just instructed to ignore that  
23 period of the analysis from the sample, given the intricacies,  
24 so I'm not sure.

25 Q. Okay. And who instructed you?

1 A. DOJ.

2 Q. And did they tell you why?

3 A. Not that I can recall here, but it's possible, but I  
4 just -- there's a lot of states, a lot of -- nothing leaps to  
5 mind right here.

6 Q. Let's take a look, if we would, very briefly at Tab 7 of  
7 the book in front of you, sir. And this is a document produced  
8 from your reliance materials. It's an e-mail dated August 3,  
9 2007, from Ms. Lamhorn to Mr. Ormond, and he is someone who  
10 assisted you with this project, right?

11 A. Yes. He worked at my direction.

12 Q. Okay. And if you go down to the narrative, in point  
13 three, the numbered Paragraph 3, the senior staff counsel from  
14 California writes to your assistant: "Claims using MAIC  
15 (Maximum Allowable Ingredient Cost). In the state case, the  
16 judge ruled in her decision granting in part and denying in  
17 part defendants' motion to dismiss the MAIC claims are not  
18 included." Do you see that language?

19 THE COURT: I don't. Where are we?

20 MR. DALY: Numbered Paragraph 3 of the letter, Judge,  
21 right in the middle of the page.

22 THE COURT: Numbered paragraph? Could you point to it  
23 on the screen.

24 MR. DALY: Do you have it, Judge?

25 THE COURT: I found it.

2 Q. So continuing, in the next paragraph that begins "In the  
3 state case," do you see that, sir?

4 A. I do.

5 Q. There's a question asked of your assistant, "The Bureau of  
6 Medi-Cal Fraud and Elder Abuse has asked us to exclude the  
7 claims listed above from the data that we pull." That includes  
8 the MAC claims. And your assistant is asked, "Should the data  
9 for your use in the federal case --" this case -- "also exclude  
10 these claims and be limited to NDC codes?" Do you see that?

11 A. I see that, yes.

12 Q. And do you recall that subject being discussed and a  
13 determination made to either include or exclude MAC-based  
14 claims, in light of the court's ruling in the California case?

15 A. I mean, we've had so many discussions about data, and --

16 THE COURT: Well, instead of playing this, did some  
17 California court rule that MAC was not based on the lower-than  
18 methodology, that California is not based on that?

19 MR. DALY: This is your ruling, Judge. This is your  
20 ruling in the California case

THE COURT: Doesn't it say the state court?

22 MR. DALY: They're calling it the state case. This is  
23 the California case where on summary judgment --

24 THE COURT: I see I see

25 Q. And it's okay if you don't remember. I'm just asking

1 you --

2 THE COURT: Well, quite candidly, I don't remember  
3 because I've done so many state cases. What did I rule about  
4 MAC in California? Did I say that there wasn't a lower-than  
5 methodology?

6 MR. DALY: You ruled that they were not appropriately  
7 in the case because you couldn't --

8 THE COURT: Because I couldn't tell.

9 MR. DALY: Yes.

10 THE COURT: Well, that was consistent with, but  
11 that's -- all right, so what's the story? Do we now know?

12 MR. TORBORG: I think what your Honor ruled was  
13 that -- there was a section in your opinion called non-AWP,  
14 non-direct price reimbursement --

15 THE COURT: Right.

16 MR. TORBORG: -- where Abbott and others had argued,  
17 claims that were not based on AWP and not based on a direct  
18 price but were based in fact on a MAC should be taken out of  
19 the case because after 2002, the MACs were not based on  
20 reported prices; they were based on wholesale and catalogs.

21 THE COURT: All right, so --

22 MR. TORBORG: And your Honor threw those out, and he's  
23 making the point, did he do it here?

24 THE COURT: All right, did you do it here, do we know,  
25 if they weren't based on reported prices?

Page 60

1                   THE WITNESS: In the analysis we do -- for each state  
2 I did quite a lot to purge, to start with a big sample of data,  
3 drop claims, drop claims, drop claims that had this or that  
4 feature. I just can't remember here on the fly the details  
5 of -- it sounds like, "Can you confirm you don't want the  
6 claims I listed above, and we should proceed back to 1994?" So  
7 is this referring to 1993 and earlier? I'm guess I'm just not  
8 sure what --

9                   THE COURT: So you're not an expert witness. Say "I  
10 don't recall."

11                  THE WITNESS: Right, I don't recall.

12                  THE COURT: "I don't recall," thank you, or he doesn't  
13 remember.

14                  So now the issue is, what do we do about this?  
15 Because at the time I'm not sure I understood the whole -- I  
16 don't remember when I ruled at what point. It always depended  
17 on how people teed this up to me. Did we understand whether  
18 there was a lesser-than methodology in California?

19                  MR. TORBORG: Ven-A-Care argued that to you, the same  
20 argument that they made here, and you rejected it.

21                  THE COURT: I just don't remember, so we'll brief that  
22 point.

23                  MR. TORBORG: Yes, it's in our briefing, actually, for  
24 summary judgment, this issue came up.

25                  THE COURT: I haven't even read the summary judgment

Page 61

1 papers. It was all I could do to get ready for today, and I've  
2 read the spoliation, so don't assume I've read it. So the  
3 issue is, you think that the lesser-than methodology doesn't  
4 work for California?

5 MR. TORBORG: Well, for all states where the actual  
6 transaction was based on a MAC, consistent with your opinion in  
7 California, if there's been no showing that the MAC was  
8 impacted by a reported price throughout the case --

9 THE COURT: I don't think we did the lesser-than  
10 methodologies in those cases. I think it was because the  
11 complaint said it was AWP-based, but I'd have to go back and  
12 look at it.

13 MR. DALY: Well, that's why my question to the witness  
14 is, and he already answered it, he hasn't analyzed this, so he  
15 doesn't know what --

16 THE COURT: No, he said he didn't remember exactly.

17 MR. DALY: Well, no, he --

18 Q. Well, I'll ask you again. You have not analyzed the  
19 effect of any Abbott price on any state MAC, correct?

20 A. I have not -- that statement is correct. I've analyzed  
21 the data very closely.

22 And I just think, your Honor, I think one piece of  
23 information that might be useful in assessing is this a big  
24 issue --

25 THE COURT: Yes.

1                   THE WITNESS: So we talked about Ohio where the MACs  
2 were systematic throughout much of the period, where the ratio  
3 of difference to spending in that state was less than  
4 50 percent, okay. And that reflects the fact that they had  
5 this very aggressive MAC program. In California, on the other  
6 hand, the ratio of difference to spending is actually higher  
7 than in the typical, a bit higher. It's right in the ballpark  
8 of all of the other states, suggesting it's not the case. And,  
9 you know, with 281,000 claims from California, maybe. You  
10 know, I would, I guess, have to go back and check. But I can  
11 tell you that if you look big picture at the data, how big of  
12 an issue is this MAC thing likely to be if they were employing  
13 these MACs very often, I would expect to see this, you know,  
14 Ohio-ish difference rather than it just looking like all the  
15 other states. So I guess I just throw that out.

16 Q. But you don't know? I mean, not having looked at it, you  
17 can't know, right?

18 A. I didn't -- so the issue -- I think there are a couple of  
19 issues here. There's the issue of, did the Abbott AWP affect  
20 the state MAC? That's one issue, and I didn't look at that  
21 issue. The second issue of, did you account for the fact that  
22 there was a MAC being paid and lower your difference, lower the  
23 difference accordingly? And I assume, the assumption that I  
24 employ is that a lesser-of methodology is being employed. Now,  
25 when I found that assumption was wrong in Ohio, knocked that

1 entire state out.

2 THE COURT: And did Myers & Stauffer, did they say it  
3 was a lesser-than methodology in California?

4 THE WITNESS: That's what, based on their analysis, it  
5 was a lesser-than methodology. And, once again, I'm not even  
6 sure of these 281,000 claims -- I don't have them memorized --  
7 how many of them used a MAC. It could be none of them. You  
8 know, for these 44 products, saying a state had a MAC program  
9 in effect, this is just 44 products, there are 25,000 NDCs at  
10 any point in time, it's just hard to --

11 Q. Take a look at Tab 5 in the book that we've given you,  
12 Dr. Duggan.

13 MR. DALY: And, your Honor, this is a tab that comes  
14 from Mr. Young, one of our expert reports, filed several  
15 months --

16 THE COURT: So this has been around?

17 MR. DALY: This has been around.

18 THE COURT: Fine.

19 MR. DALY: And it's fair to say it's relatively  
20 uncontroversial.

21 Q. You've seen this before, right, Doctor? This was in your  
22 opposing expert's report?

23 A. I've seen it.

24 Q. And you have no reason to or you haven't yet to indicate  
25 any disagreement with the information, which I'll take a moment

1 to explain, correct?

2 A. This, right, it looks, from a quick glance, it looks like  
3 an accurate description of the periods during which I utilized  
4 state-produced claims data.

5 Q. And this comes from your Table 25 in your report, if you  
6 need to look at it, but the point being that on the top are all  
7 the quarters, right, that are in the damage period, right?

8 A. Right.

9 Q. Along the left-hand margin, all the states?

10 A. Correct.

11 Q. And only one color -- actually two colors, Judge -- green,  
12 those are the time periods in which you had state-produced  
13 claim data, correct?

14 A. Those are the state quarter combinations, right, when I  
15 had the data, that's right, the state-produced claims data,  
16 when I utilized the state-produced claims data in the analyses.  
17 I had a lot of data for those other periods, just not this, did  
18 not use this.

19 Q. Well, I'll say it again. The green shaded areas represent  
20 the quarters in which you had state-produced claim data?

21 A. Correct. Used, used, because we talked about there were  
22 some states --

23 Q. That's right, you had some other ones.

24 A. Yes.

25 Q. Now, I just want to very briefly look at this because it

1 helps to make our point concerning the extrapolation. For  
2 1991, the year 1991, you had one state with claims data, right?

3 A. Correct.

4 Q. And you extrapolated to every other state in the country  
5 from that one -- from that three-quarters of data from Illinois  
6 to every other state except Arkansas, California, and Ohio,  
7 right?

8 A. Right, I used the Illinois data in that 1991 period. That  
9 was the state-produced claims data that I used to estimate the  
10 difference in the other states in conjunction with the CMS  
11 data. And I think, you know, in assessing this issue, it's  
12 worth noting that 1991 is one out of the eleven years; but in  
13 terms of the fraction of the amount paid, it's two percent of  
14 the spending. So, you know, in the same way I think it's  
15 helpful to bear in mind when looking at this figure -- you  
16 know, one can present figures and data in a number of different  
17 ways -- 1991 is sort of equal in this figure to 1999 when there  
18 was, you know, about ten times more spending in California and  
19 Vermont and so on, so it's just worth noting this 1991.

20 Q. So whatever the percentage of the overall damages are  
21 represented in 1991, you extrapolated them all from  
22 three-quarters of Illinois data?

23 A. Correct, that's correct.

24 Q. And then for 1992, we have two states have joined the  
25 party. We have Illinois and we have New Jersey. And from

1 those two states' claims data, you extrapolated to the other  
2 47 states, or whatever it is?

3 A. Correct.

4 Q. Right? And it's not until 1995, 1996 that you get  
5 anything more than seven or eight states involved, right?

6 A. I have eight states in the first quarter of '95.

7 Q. And then looking at your backwards extrapolation, we see  
8 Illinois is your most productive state in terms of claims data  
9 that you got from them, right?

10 A. They have data for the most quarters.

11 Q. Michigan is relatively small by comparison, correct?

12 A. In terms of the share of quarters, that's correct.

13 Q. And so what you did in Michigan is, you took these last  
14 five quarters and extrapolated all the way back to Q-2 1991 for  
15 Michigan, right?

16 A. That's correct.

17 Q. And then that Michigan reverse extrapolation then also  
18 went into the difference ratios that you applied to the states  
19 that you didn't have any claims data for; isn't that correct?

20 A. No. The Illinois -- so let's take 1993 quarter four.

21 Florida, Illinois, New Jersey, New York, and Wisconsin are  
22 being used in the calculation of DIFF-FRAC. So those five  
23 states are forming -- I'm using those five states, taking the  
24 average of those states' DIFF-FRAC for each of the 44 products  
25 in each of the four quarters, and basically taking that average

1 and then applying it to the states like, for example, Nebraska  
2 or South Dakota or what have you. So it's not -- I guess I  
3 interpreted what you said to mean that when extrapolating back  
4 in Michigan, the DIFF-FRAC that I calculate in Michigan in '93  
5 is being used to estimate South Dakota, and that's not true. I  
6 was just trying to clarify that.

7 Q. Okay, I appreciate that. And so when we look at '91 and  
8 '92, the only states' data that's being used to extrapolate the  
9 other 48 are New Jersey and Illinois, right?

10 A. They're being used to extrapolate to 38 states.

11 Q. Thirty-eight states.

12 A. Right, because they're not extrapolating to the other --  
13 I'm using Michigan to extrapolate back in Michigan and, you  
14 know, New York to extrapolate back in New York; but it's true  
15 that I'm in '92 using New Jersey and Illinois to extrapolate  
16 to, you know, Idaho and so forth.

17 Q. Now, I think, based on your testimony yesterday as well,  
18 but these 11 states -- I'm sorry -- 10 states because Ohio came  
19 out -- the 10 states, those are states that you selected on a  
20 combination of two things: One, it was data that was  
21 available, and, two, you were concentrating on the largest  
22 states, right?

23 A. That's correct. It was a combination of factors, but  
24 that's a high-level summary of it.

25 Q. And that's because you felt that it was -- in your

1 affidavit, Paragraph 74, that's when you said that because it  
2 was more important to you to be more accurate with respect to a  
3 place like Florida versus a place like Vermont?

4 A. In terms of arriving at the most accurate possible number  
5 for this difference, it is true that Florida looms larger than  
6 Vermont.

7 Q. Doctor, at the end of your testimony yesterday, one of the  
8 things that you said was, you were talking about the new  
9 analysis that you did for the 9 states. Do you recall your  
10 testimony on that generally yesterday?

11 A. I do.

12 Q. And at the end of your testimony, you said you kind of  
13 wished that you had done a little bit better than 6 percent?  
14 Do you remember that? Do you remember saying that?

15 MR. LAVINE: Your Honor, just to clarify, this is the  
16 attachment to one of the exhibits that we used yesterday, but  
17 it's been stripped away from the letter that came with it.  
18 That's all.

19 THE COURT: I don't know what you're talking about.

20 MR. LAVINE: I'm sorry, the new document that --

21 MR. DALY: I have not given it to anybody yet.

22 MR. LAVINE: Oh, I'm sorry.

23 A. In terms of an out-of-sample prediction, there was a  
24 difference of about 6 percent between --

25 Q. Right. My question was, you lamented that you hadn't done

1 a little bit better than that on an overall basis yesterday,  
2 right?

3 A. I think anyone would prefer an estimate that differed by  
4 zero to one that differed by more than zero, any trained  
5 empirical economist if they're trying to do a out-of-sample  
6 prediction.

7 Q. Did you wish you had done better than 42 percent?

8 A. I'm not sure what you mean.

9 Q. Well, you told the Court that the overall situation was,  
10 you were very happy to see that it was within 6 percent. That  
11 was your testimony yesterday, right?

12 THE COURT: Well, what is this? What am I looking at?

13 MR. DALY: I'm just --

14 Q. The document I've handed you, sir, that's your table that  
15 goes with the new analysis that you gave us last Monday, right?

16 A. That's correct.

17 Q. And this table is the new 9 states, right --

18 A. Correct.

19 Q. -- that you've done a claims analysis for based on claims  
20 data that you've had for a long time but decided to do for this  
21 hearing, right?

22 THE COURT: That's a week ago Monday? Is that it?

23 MR. DALY: Yes.

24 A. Eleven days ago. Uhm --

25 Q. This is your table, right?

1 A. Right, this is.

2 Q. And these are your 9 states on the left-hand column,  
3 right?

4 A. Correct.

5 Q. And what it shows is that two of the states went up, and  
6 that's Texas and Massachusetts, right?

7 A. Correct.

8 Q. And 7 of the 9 states, your damages analysis actually went  
9 down from where you had extrapolated it, correct?

10 A. Correct.

11 Q. And that's not something you mentioned yesterday, is it?

12 A. I did not, but I do think yesterday --

13 Q. And in fact if you look at Utah, for example, it went from  
14 486,000 in damages that you originally extrapolated to 342,000,  
15 right?

16 A. That's Iowa, but --

17 Q. Iowa, I'm sorry.

18 THE COURT: All right, no wonder I'm looking at the  
19 wrong --

20 MR. DALY: Thank you, Judge.

21 Q. Iowa goes from 486,000 to 342,000, right?

22 A. That's correct.

23 Q. That's a decrease. That's 42 percent, right?

24 A. No, it's not a decrease of that amount.

25 Q. What's the percentage between 342,000 and 486,000?

1                   THE COURT: Well, you've probably done it. Have you  
2 done the math?

3                   THE WITNESS: So, I mean, I can, if you want, 144,000  
4 is the difference. Divided by 486,000, that's in the  
5 neighborhood of about 30 percent.

6 Q. Okay, so that's 30 percent off?

7 A. 29, 30, 31, I don't know exactly, but it's in that  
8 ballpark.

9 Q. All right. And how far off is Minnesota?

10 A. Minnesota is off by about 10 percent.

11 Q. Right. And Utah is off by what, about 26 percent?

12 A. No. About 21.

13 Q. About 21? Okay.

14 A. I guess one thing worth bearing in mind when interpreting  
15 the numbers in this table is that, as I indicated yesterday,  
16 these 9 look less like the first 10 than the remaining 29 in  
17 terms of this usual and customary thing. So part of the  
18 explanation for this difference is that usual and customary is  
19 paid in these states more often than in the other 10, but it's  
20 also paid more often than in the other 29. So just, you know,  
21 the extrapolation is -- so it's worth bearing that in mind.

22 Q. So 7 of the 9 states went up when you did your actual  
23 claims analysis on these states that you gave us eleven days  
24 ago, right?

25 A. Seven of the 9 went down.

1 Q. Seven of the 9 went down, right?

2 A. Correct.

3 Q. And there are still 30 states out there that you haven't  
4 done any claims analysis for, correct?

5 A. I disagree with that.

6 Q. Well, state-produced claims analysis, correct?

7 A. That's correct, 29 states.

8 Q. And some of those 29, some of them have data available,  
9 and some of them don't, right?

10 A. That is correct.

11 Q. Okay. And let's take --

12 A. Have state-produced data available in some of them.

13 Q. Okay, let's take Oklahoma. Oklahoma is one of those  
14 states that you haven't done anything with on the claims data,  
15 right?

16 A. I have not used Oklahoma state-produced claims data, but I  
17 have used CMS claims data that is the result of Oklahoma  
18 state --

19 Q. So you extrapolated some value for Oklahoma, though,  
20 didn't you, in the damages?

21 A. I did.

22 Q. Okay, so if you redid it, is Oklahoma going to look more  
23 like Iowa at the 29 percent, or is it going to look more like  
24 one of these other states that's within 2 or 3 percent of your  
25 original extrapolation?

1 A. I don't have Oklahoma's data or methodology memorized, so  
2 I'm not sure.

3 Q. So you don't know?

4 A. Do I know --

5 Q. You don't know, do you?

6 A. -- whether Oklahoma will be high or low?

7 Q. Right.

8 A. I don't know.

9 Q. Nor do you know by how much?

10 A. I think that --

11 THE COURT: He doesn't know. You know, we're trying  
12 to wrap this up.

13 MR. DALY: I'm sorry. I'm just trying to get an  
14 answer, Judge.

15 THE COURT: How much longer do you have? Because  
16 you're now at about the period of time the other side had  
17 yesterday, because, don't forget, yesterday we had the opening  
18 statements and we had a break, and I haven't had that, and I'm  
19 fading, so --

20 MR. LAVINE: And I'd still like to beg for a little  
21 bit of redirect.

22 THE COURT: You know what? I have been going  
23 straight. You had the break, I didn't, and I have been on  
24 trial since quarter of 9:00 this morning, and so I am fading.

25 MR. LAVINE: Maybe one or two questions?

1 MR. DALY: Judge, I am quickly wrapping up.

2 Q. You mentioned yesterday that -- you said something about,  
3 "When I reviewed the claims, I've now reviewed 2.4 million, and  
4 there's only a few hundred thousand that I haven't looked at in  
5 terms of claims data." Was that your testimony?

6 A. That's not what I said.

7 Q. What did you say about having reviewed 2.4 million claims?

8 A. I recall that I caveated it with the point that in that  
9 2.4 million claims, there were some claims to which I was doing  
10 the backwards extrapolation, so the 2.4 million number might be  
11 closer to, and if one pulls out Indiana, it may be closer to  
12 about 2.0 million. And, moreover, I think that I tried to do  
13 some sort of head math. There were 890,000 claims for the  
14 other 38 states, and I thought that I had about 350,000 in  
15 these new 9 states. So I think what I said was that there were  
16 about 550,000 claims in those remaining 29, and that in the  
17 first 19 there were about 2.4 million, the vast majority of  
18 which I did use the state-produced data for.

19 Q. But that 2.4 million includes Indiana and includes all of  
20 the claims that are not based on claims data, right? So, in  
21 other words, you're throwing in the SMRF and the SDUD data into  
22 that 2.4 million, right?

23 A. And precisely why I --

24 Q. Is that true? That's all I want.

25 A. That's why I caveated it yesterday. So that's why

1 yesterday I said the 2.4 million includes some backwards  
2 extrapolation. For example, in Michigan, one would have to  
3 subtract off -- I'm pretty sure that yesterday I went through a  
4 bit of that, but given the time limitation, I didn't dwell on  
5 it.

6 Q. A couple of small points. You talked a little bit  
7 yesterday about this per-claim spending, this Footnote 45 from  
8 your report where you said you had done some sort of check on  
9 the situation and found that what, 24 of the 44, what, had  
10 actually spent more? Or what was that again?

11 A. So that was trying to gauge -- essentially I was trying to  
12 gauge the comparability of the sample of 10 with the remaining  
13 38, and the notion was that if the remaining 38 were all  
14 Ohio-type states, then it would be the case that paid amounts  
15 per claim would tend to be lower in those remaining 38 states  
16 for the 44 products. So that comparison was in an effort to  
17 assess, do we have a bunch of Ohios in these remaining 38, or  
18 are they pretty reflective? And what I found, that, if  
19 anything, on average, those 38 states had average reimbursement  
20 that was a bit higher on -- you know, for 24 out of 44, it was  
21 higher. For the other 20, it was lower, but more often than  
22 not -- and those 24, mind you, also accounted for about  
23 75 percent of the Medicaid spending. So, if anything, you  
24 know, they looked very comparable, and, if anything, it looked  
25 like they were a bit less Ohio-intensive, if you get what I'm

1 trying to say there. So, in any case, they looked very  
2 comparable.

3 Q. So this analysis, could you tell the Court what time  
4 period it covered.

5 A. It covered 1999 to 2001, and I think yesterday --

6 Q. So only three years of the damage period?

7 A. Right, so the goal was to --

8 Q. No, no, that's my only point.

9 A. -- apples and apples.

10 Q. So the analysis that you talked about yesterday only  
11 covered three years, '98 to 2001. It didn't go all the way  
12 back to 2001, right?

13 A. You mean to '91, you mean.

14 Q. To '91.

15 A. Right.

16 THE COURT: We're talking about the new 10 states?

17 THE WITNESS: No. We're talking about the comparison  
18 of the average prices and the sample of 10 states versus the  
19 other 38. So you line up 44 prices for the 10, 44 prices for  
20 the 38 to see, do they look similar? And the period -- what  
21 he's saying is that the period over which I calculated those  
22 prices was just the last three years, '99 to 2001, because  
23 those are the only three years for which I have identical data  
24 for all 49 states. It's CMS claims-level data for all 49  
25 states. So that's the explanation for that.

1 Q. So that those are the only years that you had the data  
2 for. Are there reasons why the results would be different  
3 between the two samples?

4 A. I think -- and so one thing that is apparent from an  
5 inspection, from a careful inspection of the adjudication  
6 methodologies used by the states is, there's a great deal of  
7 similarity. You know, 8 out of 10 use AWP, 30 out of 38 use  
8 AWP, similar dispensing fees and so forth, but inevitably there  
9 are going to be differences. One state, as we discussed  
10 yesterday, may have a bit -- their pharmacies for whatever  
11 reason may tend to submit lower usual and customaries. In  
12 another state there may be -- like, there are nuances, so  
13 there's variation. Part of why I'm leveraging all this data is  
14 to sort of come up with a reliable, valid estimate of --

15 Q. Right, but I'm just trying to focus on this test that you  
16 did, and I think you started on this line, but there's a lot of  
17 reasons why it might be higher in the 38 than it is in the 10,  
18 and you started to list those. It could be that they had  
19 different formulas involved, right, different adjudication  
20 formulas by the state, right?

21 A. Sure, right.

22 Q. It could be because there were MACs involved in one state  
23 and not another, right?

24 A. Yes.

25 Q. It could be different U and C charges that were

1 administered by the states? In other words, some states have  
2 one definition of U and C, other states have other definitions  
3 of U and C, right?

4 A. I don't know about the definition of U and C, but there  
5 just may be a different tendency, a different culture of  
6 reporting it.

7 Q. And how they treat co-pays within the state, that can  
8 impact this kind of an analysis too, right?

9 A. A bit.

10 Q. Yes? I'm sorry.

11 A. A bit, yes, co-pays do.

12 Q. When you do this comparison, you want to do an apples to  
13 apples, right?

14 A. Correct.

15 Q. And so you'd want to compare, you know, five units in one  
16 state to five units in another state in an ideal world, right?

17 A. It is --

18 Q. Is that true?

19 A. I think the goal is to compare the 10 with the 38.

20 Q. No, no, I'm sorry. I'm talking about five units of drug.  
21 I mean, if you had five bags of saline in Arkansas, you'd want  
22 to compare that to five bags of saline in Oklahoma, right?

23 A. That would be an even more -- that would be an apples to  
24 apples.

25 Q. And that's what you'd want in an ideal world, right?

1 A. I, uhm. . . I think that the analysis -- so the analysis  
2 that I did is looking at the amount paid per claim, and so it  
3 is true, there could be differences in terms of the number of  
4 units. So the assumption is that across the 10 states, 44  
5 products, so the 440 NDC quarter combinations, there's  
6 inevitably going to be differences between -- that's even true  
7 in random samples. If you take huge random samples, there's  
8 differences between the two groups. You take the 440 and you  
9 compare them with the remaining NDC state combinations, and in  
10 some cases the average units will be higher in the 10 for  
11 vanco, and in others it will be lower, but there is some --  
12 that's another factor, sure.

13 Q. Right. So one state on a claim might have paid for ten  
14 units of drug X, and another state might have paid for one  
15 unit, and there would be a very large disparity between the  
16 prices, right?

17 A. For those two specific claims, that's true.

18 Q. Right, right. And you didn't control for in this analysis  
19 that you did in Footnote 45 for one state paying \$600 for ten  
20 doses and a state paying \$6 for one, right?

21 A. So, remember, it's an aggregate of hundreds of thousands  
22 of claims.

23 Q. Is what I said right?

24 A. So it is true that units -- it was not a price per unit.  
25 It was a price per claim. It was a reimbursement amount per

1 claim.

2 Q. Right. And so when you did the per claim thing, one claim  
3 might be for ten. So you might have a \$600 claim put in for  
4 ten units, and that \$600 was part of the average, right? And  
5 it would be one claim, right?

6 A. That's correct, in that one example.

7 Q. Right. And then in another state, they submitted one  
8 claim for one bag of saline for ten bucks, and that would also  
9 get a rate of one and go into the average that you're talking  
10 about, right?

11 A. Right, so identifying -- you know, at some level, to the  
12 extent that there are systematic differences in units between  
13 the 38 for the 44 products versus the ten, you know, what one  
14 would -- you know, that could influence this price per claim.  
15 But, you know, it is to the extent that some claims will have  
16 many units, some claims will have fewer units, so it's going to  
17 vary.

18 Q. And your Footnote 45 analysis didn't control for differing  
19 units across states, correct?

20 A. Differences in the number of units per claim, it's an  
21 average amount paid per claim, so to the extent that -- you  
22 know, if it were true -- you know, to the extent that the  
23 number of units are similar in the 10 to the number of units in  
24 the 38, that's going to balance out. But it's an amount paid  
25 per claim, I'll concede, you know.

1 THE COURT: Why don't you finish up here.

2 MR. DALY: I am. Just one moment, Judge. I think I  
3 am finished.

4 No further questions, Judge.

5 THE COURT: That's beautiful. So what do you --

6 MR. LAVINE: One very important point to clarify, and  
7 it will only take a moment.

8 THE COURT: Yes.

9 REDIRECT EXAMINATION BY MR. LAVINE:

10 Q. On Table 43 discussing --

11 THE COURT: What tab are we talking about?

12 MR. LAVINE: I'm sorry. It's Table 43 --

13 MR. DALY: It would be Tab 1 in our book, Judge.

14 MR. LAVINE: And it's also Tab 1 in ours. It's the  
15 next-to-last table in his original report.

16 THE COURT: All right, yes, we've been there before.

17 MR. LAVINE: Right.

18 Q. And we talked about the Abbott prices showing up in almost  
19 every array that you looked at, but then you said that the  
20 Abbott NDC appeared as the allowed amount about 24 percent of  
21 the time?

22 A. Right.

23 Q. So in the chart, on the fifth column in, "Percentage of  
24 Claims," and Connecticut General, the first number is  
25 86.1 percent, what does that percentage indicate?

1 A. What that indicates is that for 86 percent of the claims,  
2 an Abbott AWP was at or above the median; and thus revising it  
3 with the Abbott-based price brought it down, basically resulted  
4 in a difference greater than zero. And I should note, I think  
5 it's important to note, that actually understates substantially  
6 the number of claims where Abbott was at or above the median  
7 because -- I don't have this number right here off the top of  
8 my head, but if I recall, I think a very large share -- and it  
9 may be the majority, and it may be the vast majority, I just  
10 can't remember here off the top of my head -- a very large  
11 share of those claims where the difference is equal to zero,  
12 it's not because Abbott is not affecting the median; it's  
13 because the usual and customary was paid.

14 So in that example that Abbott counsel gave earlier,  
15 that Mr. Daly gave earlier, about 10.03 moving to 9.67, okay,  
16 so in that array, the median moved from 10.03 to 9.67, there  
17 are going to be some claims in the data where they paid usual  
18 and customary of like \$8 or \$9 or \$7. So there's no difference  
19 on that claim. So this 86 percent doesn't mean that in  
20 86 percent of the claims -- it turns out that -- once again, I  
21 don't have it here at my fingerprints, but the vast, vast  
22 majority of the claims have an Abbott AWP at or above the  
23 median. This is largely being driven by usual and customary,  
24 and that's something that I should have made clear, and it's  
25 hard to keep this all straight.

1 Q. But this means that replacing the Abbott price as  
2 published with your alternative prices changed the median  
3 allowed amount at least 89 percent of the time?

4 A. 86 percent of the time for Connecticut General, that's  
5 right. And were it not for that usual and customary, that  
6 number would be considerably higher.

7 Q. And the 24 percent was different in the sense that it was  
8 the percentage of times at which Abbott's AWP was the actual  
9 median?

10 A. Correct, that's right.

11 Q. As opposed to Abbott's AWP changing the median when it was  
12 corrected?

13 A. Exactly, exactly. So much more often than not Abbott is  
14 above the median. So for every time Abbott is at the median,  
15 there are about 2.6 times where it's above the median in terms  
16 of claims. So there are many more claims where it's above the  
17 median and affects it than where it's at the median.

18 THE COURT: Anything based on that line of  
19 questioning?

20 MR. DALY: No, your Honor.

21 THE COURT: Thank you.

22 THE WITNESS: I'm done?

23 THE COURT: You're done.

24 (Witness excused.)

25 THE COURT: So let's think about this. One thing that

1 can't happen is new data coming up at the last minute, new  
2 charts, new data. So you now have everything -- do you have  
3 any new studies or anything that your experts have done? Is  
4 that what I'm hearing they're concerned about?

5 MR. DALY: No, we have no studies. We just had some  
6 demonstratives.

7 THE COURT: All right, so have your experts done new  
8 data analyses that they're going to be testifying --

9 MR. DALY: Your Honor, I will tell you that we have  
10 been working a little bit on this very new stuff that we just  
11 got last week, and we may have some stuff, and what your Honor  
12 is going to say is that when we have it, we should give it to  
13 the other side.

14 THE COURT: Immediately, because I won't allow it in.  
15 And this new chart is a problem because for both sides, you  
16 can't do that. I won't even allow examination next time. I  
17 happened to find the gray-red chart very helpful, but this one  
18 you can't go through that fast. You'd have to correlate the  
19 data.

20 MR. DALY: Our experts will be able to do that, Judge.

21 THE COURT: But no new ones. Don't do it again, okay?

22 All right, so now the next question is when. We have  
23 so much more to do in this case. What do you estimate, since  
24 you were so wildly, both of you, off on what we could get  
25 accomplished before? I'm assuming, will one afternoon -- how

Page 85

1 many experts do you have left? Let's go off the record because  
2 Lee has been at this all day too.

3 (Discussion off the record.)

4 (Adjourned, 4:45 p.m.)

5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 C E R T I F I C A T E  
2  
3  
4  
5  
6

UNITED STATES DISTRICT COURT )  
DISTRICT OF MASSACHUSETTS ) ss.  
CITY OF BOSTON )  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I, Lee A. Marzilli, Official Federal Court Reporter,  
do hereby certify that the foregoing transcript, Pages 1  
through 85 inclusive, was recorded by me stenographically at  
the time and place aforesaid in Civil Action No. 01-12257-PBS,  
In Re: Pharmaceutical Industry Average Wholesale Price  
Litigation, and thereafter by me reduced to typewriting and is  
a true and accurate record of the proceedings.

In witness whereof I have hereunto set my hand this 8th  
day of January, 2010.

/s/ Lee A. Marzilli

---

LEE A. MARZILLI, CRR  
OFFICIAL FEDERAL COURT REPORTER